

STATE OF MICHIGAN  
COURT OF APPEALS

---

ABRAHAM NUNU,

Plaintiff-Appellee,

v

CITY OF DETROIT and DETROIT BUILDING  
SAFETY & ENGINEERING DEPARTMENT,

Defendants-Appellants.

---

UNPUBLISHED  
November 6, 2001

No. 220590  
Wayne Circuit Court  
LC No. 99-900948-AW

Before: Bandstra, C.J., and White and Collins, JJ.

PER CURIAM.

In this zoning ordinance case, defendants appeal as of right from the issuance of a writ of mandamus requiring that they issue the permits necessary to allow plaintiff to operate a gas station on his Linwood Street property in the city of Detroit. We reverse.

In challenging the writ, defendants first argue that the trial court erred in determining that they were estopped from requiring plaintiff to apply for a special land use permit because the construction permits issued listed “gas station” as the type of property at issue. We agree. Even assuming that the subject notation constituted approval of the use of the property as a gas station without issuance of a special land use permit, such approval was not authorized by the applicable ordinance and defendants are therefore not estopped from enforcing the ordinance. See *DeGaynor v Dickinson County Memorial Hospital Bd of Trustees*, 363 Mich 428, 436-437; 109 NW2d 777 (1961). Plaintiff is “charged with knowledge of the restrictive provisions of the ordinance” and, thus, must comply with the ordinance in his use of the property. *Fass v Highland Park*, 326 Mich 19, 31; 39 NW2d 336 (1949).<sup>1</sup> This is not a case like *Dingeman Advertising, Inc v Algoma Twp*, 393 Mich 89; 223 NW2d 689 (1974), where a land owner’s use of its property was negatively impacted by an ordinance passed after the use occurred. Further,

---

<sup>1</sup> The record establishes that within a few weeks of receiving the building permit plaintiff was informed by defendants regarding the special land use permit requirement. Further, uncontested evidence presented along with defendants’ lower court motion for reconsideration indicates that plaintiff’s agents had been advised about the special land use requirement prior to receiving the building permit.

we do not conclude that this case presents the kind of “exceptional circumstances” necessary to abrogate the usual rule and estop defendants from enforcing the ordinance. See *Pittsfield Twp v Malcolm*, 375 Mich 135, 147; 134 NW2d 166 (1965).

Defendants further argue on appeal that the trial court abused its discretion in granting plaintiff’s request for a writ of mandamus because plaintiff failed to exhaust his administrative remedies before seeking the writ. Again we agree. A circuit court’s grant of a writ of mandamus is reviewed for an abuse of discretion. *In re MCI Telecommunications Complaint*, 460 Mich 396, 443; 596 NW2d 164 (1999).

Initially, we note that under MCR 3.302(C), “a superintending control order replaces the writ of mandamus when directed to a lower court or tribunal, [and thus,] a municipal zoning authority is subject to the circuit court’s superintending control, not its power of mandamus. *Choe v Flint Charter Twp*, 240 Mich App 662, 666; 615 NW2d 739 (2000). As such, the trial court erred in issuing a writ of mandamus requiring defendants to approve plaintiff’s plans and application. See *id.* at 666-667. However, to reverse solely because a writ, rather than an order of superintending control was issued, “would be to elevate form over substance.” *Id.* at 667. Nevertheless, reversal is warranted because mandamus was improper on additional grounds.

As a general rule, “persons seeking authority from a governmental unit must exhaust their remedies within such governmental unit before seeking relief in court.” *Lake Angelo Associates v White Lake Twp*, 198 Mich App 65, 74; 498 NW2d 1 (1993). Thus, “a writ of mandamus is not to be issued where the plaintiff can appeal the error.” *Id.* at 73. In addition, MCR 3.302(D)(2) expressly provides that “[i]f superintending control is sought and an appeal is available, the complaint for superintending control must be dismissed.”

In this case, plaintiff had the right to an administrative appeal of defendants’ refusal to review plaintiff’s application for construction and occupancy permits. Detroit Zoning Ordinance § 62.0301 provides that appeals to the board of zoning appeals may be taken by any person aggrieved by a decision of the defendant safety and engineering department. Further, and more to the point, plaintiff had the right to seek a special land use permit. We recognize plaintiff’s argument that, under the facts of this case, such a permit is not required. However, that argument can be pursued by plaintiff before the governmental unit in the administrative process. Its resolution there or the grant of the permit may well obviate the need for judicial action. If not, judicial review will be aided by the administrative record and decision developed in the process of plaintiff’s exhausting his administrative remedies. Because plaintiff has failed to exhaust these remedies, the trial court erred in granting plaintiff’s request for a writ of mandamus. *Choe, supra* at 667.

We reverse.

/s/ Richard A. Bandstra  
/s/ Jeffrey G. Collins